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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Joint Applications of OnePoint Communications)
Corp. and Verizon Communications for Authority)
Pursuant to Section 214 of the Communications Act)
of 1934, as Amended, To Transfer Control of)
Authorizations To Provide Domestic Interstate and)
International Telecommunications Services as a)
Non-Dominant Carrier)

CC Docket No. 00-170
DA 00-2155

REPLY COMMENTS OF ONEPOINT AND VERIZON

ONEPOINT COMMUNICATIONS CORP.

Richard P. Kolb
OnePoint Communications Corp.
Two Conway Park
150 Field Drive, Suite 300
Lake Forest, IL 60045
(847) 735-7000

VERIZON COMMUNICATIONS

Michael E. Glover
Karen Zacharia
Verizon
1320 North Courthouse Road, 8th Floor
Arlington, VA 22201
(703) 974-4865

Jeffrey S. Linder
Nancy J. Victory
Daniel J. Smith
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel to Verizon

October 27, 2000

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Executive Summary

The Public Interest Statement accompanying the Verizon/OnePoint transfer applications demonstrated that this merger will yield four significant public interest benefits. First, the transaction will preserve and enhance OnePoint's core business of providing competitive video, broadband, Internet, and telephony services to residents of MDUs. Second, the merger permits the merged company to compete more effectively in the MDU business against AT&T and other cable operators. Third, it promotes Verizon's commitment to be a major nationwide competitor, affording access to MDUs in key markets in each of the other RBOCs' regions. Fourth, it expedites the deployment of advanced services and applications in MDUs, bolstering an open competitive alternative to the closed broadband networks operated by AT&T and other cable companies.

Only one party – AT&T – even attempts to dispute these benefits. Notably, however, AT&T chooses to ignore the primary benefit to the public of this merger: the ability of the merged company to offer video services, high-speed Internet access, and a choice of ISPs where AT&T previously was the sole provider. Its failure to acknowledge (let alone to refute) this benefit is understandable, since AT&T's clear motivation for opposing this merger is its overriding desire to insulate its 100-billion dollar investment in cable from competition.

Instead, AT&T mischaracterizes both the Public Interest Statement and the declaration of OnePoint's Chief Financial Officer (attacking a "failing firm defense" that was not made and is entirely unnecessary, and casually dismissing the tangible financial concerns detailed in the declaration), blames ILECs for causing the financial woes currently affecting many CLECs (ignoring, among other things, the NASDAQ-wide drop in valuations), and haphazardly tosses out a series of other illogical and entirely unsupported assertions. Try as it might, AT&T's petition in no way diminishes the very real benefits that will result from this merger.

The arguments claiming that the merger raises competitive concerns are no more persuasive. In fact, these assertions should be doomed from the start by the Department of Justice's decision to grant early termination of the Hart-Scott-Rodino waiting period. It would be unprecedented for the Commission to find competitive problems with a merger (let alone deny it) where the Department has acted in this manner. Such action would be even more unreasonable here given OnePoint's *de minimis* presence in Verizon's region – OnePoint is a pure reseller serving only approximately 0.027 percent of local telephone subscribers within Verizon's footprint. In any event, AT&T's competitive claims rest entirely on gross misinterpretations of the Commission's recent merger decisions. For its part, ALTS's request for a condition requiring OnePoint to cancel its existing exclusive marketing arrangements is wholly unrelated to this merger and relates to matters pending in an ongoing FCC proceeding of industry-wide applicability. The Commission quite properly declines to grant relief in such circumstances.

Finally, AT&T's Section 271-related arguments have no foundation in reality. All Section 271 concerns related to this merger – that is, all instances where OnePoint provides in-region, originating interLATA services – will be taken care of before the time the merger closes, when OnePoint completes the divestiture of its in-region long distance customers, implements a global service provider (“GSP”) arrangement for its very limited in-region Internet access service, and blocks in-region originating calls using OnePoint pre-paid calling cards.

The Commission should grant these transfer applications as rapidly as possible. The filing of meritless pleadings by competitors cannot be permitted to delay approval of a merger that is patently in the public interest, particularly when expeditious closing is essential to the continued competitive vigor of one of the parties.

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ATTACHMENT 1: E-mail from A. Broach, AT&T, to Teresa Ward, Verizon, dated Oct. 20, 2000

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REPLY COMMENTS OF ONEPOINT AND VERIZON

Verizon's acquisition of OnePoint is in the public interest. The Comments of AT&T Corp. and the Association for Local Telecommunications Services ("ALTS") opposing this merger are entirely meritless – as is made clear from the fact that the Department of Justice granted early termination of the Hart-Scott-Rodino waiting period for this transaction. Accordingly, these parties must not be permitted to delay timely grant of these transfer applications.

I. VERIZON'S ACQUISITION OF ONEPOINT IS INDISPUTABLY IN THE PUBLIC INTEREST.

The Public Interest Statement attached to the transfer applications demonstrated that this merger will advance the public interest in four respects:

- It will provide OnePoint with funding that is essential to preserving and expanding the company's core business of providing bundled services to residents of MDUs.
- It will allow the merged company to compete more effectively in the MDU business, where it faces intense competition from AT&T, other cable operators, and competing facilities-based carriers such as RCN.
- It will promote Verizon's commitment to be a major nationwide competitor, affording access to MDUs in key markets in each of the other RBOCs' regions.

- It will expedite the deployment of advanced services in MDUs and, through the anticipated provision of streaming video and other applications, strengthen an open competitive alternative to the closed broadband networks operated by AT&T and other cable companies.¹

Only AT&T even attempts to challenge these benefits, and its efforts are unavailing.²

Most notably, AT&T ignores the prime driver behind this merger, and the primary benefit to the public: the ability of the merged company to compete more effectively against AT&T and other incumbent cable operators – the 800-pound gorillas in the MDU space – in providing service bundles including high-speed Internet access and video services to residents of these buildings.³ AT&T's failure to discuss this benefit is not surprising. Doing so would force it to concede its true motivation in opposing this merger – protecting its more than 100 billion dollar investment in cable companies and their closed broadband networks.⁴ The combination of Verizon and OnePoint is a direct competitive threat to that investment, since the merged company will offer video services, high-speed Internet access, and a choice of ISPs where AT&T previously was the sole and exclusive provider.

¹ Public Interest Statement, filed Sept. 5, 2000, at 1-5.

² Interestingly, while AT&T's attorneys have filed these comments attacking the proposed transaction, its business people have already contacted OnePoint to highlight the exciting business opportunities they perceive it will create. *See* E-mail from Anita M. Broach, Alliance Channel Sales Manager, AT&T, to Teresa F. Ward, Verizon, dated Oct. 20, 2000 (attached as Attachment 1).

³ AT&T likewise ignores the Applicants' showing that the merger will expedite the deployment of DSL in MDUs. *See* Public Interest Statement at 4.

⁴ The Commission, of course, is well aware of the lengths to which AT&T will go to maintain control over its cable investments. *See* "FCC Chief Slams AT&T Lobbying Efforts," <http://www.nytimes.com/reuters/business/business-att-kennard-.html>, Oct. 23, 2000.

Having failed to acknowledge (let alone rebut) the benefits of this merger in the provision of video and broadband services to MDU residents, AT&T instead disputes whether the merger will help preserve and expand OnePoint's offerings⁵ and asserts that the merger will reduce OnePoint's ability to offer bundled services rather than enhancing the combined company's efforts to compete against AT&T and other cable incumbents in this area.⁶ Its arguments are wholly unpersuasive.

With respect to OnePoint's financial condition, AT&T first asserts that the company's press releases show that it is highly successful.⁷ Setting aside the fact that the most recent press release cited by AT&T is more than six months old – and that the capital markets have changed dramatically in the interim – OnePoint's past success is not the issue.⁸ Indeed, the Applicants base their expectation that the merger will help expedite the deployment of advanced services

⁵ AT&T Petition to Deny at 16-17.

⁶ *Id.* at 18-19.

⁷ AT&T mischaracterizes the Applicant's argument as a "failing firm" defense. It is not. A failing firm defense is employed to justify a merger that otherwise would fail the tests in Sections 1 through 4 of the Joint Merger Guidelines. *See* Joint Merger Guidelines, § 5.0; *Citizen Publishing v. U.S.*, 394 U.S. 131, 138-39 (1969). In this case, there are no anticompetitive effects under the Guidelines, as is confirmed by the Department's decision to grant early termination of the HSR waiting period. Thus there is no need to employ such a defense. The Applicants' argument simply is that the merger will enable OnePoint to be a far stronger competitor nationwide than it could be without Verizon's help, given the substantial tightening of the equity and debt markets.

⁸ OnePoint's Chief Financial Officer, John Stavig, noted that "many comparable competitive carriers that targeted the residential multi-dwelling unit market with competitive telephony services over the past five years have failed. . . . After initial periods of growth, each of these companies was unable to secure sufficient capital to continue to operate and expand its business." Public Interest Statement, Attachment 1, at 3-4.

and competitive video services on the fact that OnePoint has been able to make headway against the cable incumbents in the provision of services to MDU residents.

The real issue is whether OnePoint will be a less effective competitor absent this merger – an issue about which there is no real doubt. The Stavig declaration makes it quite clear⁹ – notwithstanding AT&T’s efforts to cast it in an equivocal light – that tapping the equity and debt markets is not viable at this point. As Mr. Stavig warned, “[w]ithout sufficient capital . . . the Company will be forced to scale back its network deployment, thereby continuing operating losses from OnePoint’s current resale platform and restricting its ability to offer competitive high-speed data services.”¹⁰ While such a result might suit AT&T’s parochial business interests by weakening a potential competitor to its cable and broadband operations, it plainly does not serve the public interest.

AT&T’s next argument is nothing less than ludicrous: it asserts that, even if OnePoint were having financial problems, “[t]he obvious reason for the financial difficulties sweeping the competitive LEC industry is that Verizon and the other incumbent LECs continue to refuse to open their local markets to competition and it is simply not possible profitably to offer local services in competition with these entrenched monopolists.”¹¹ In reaching that conclusion, AT&T ignores the general, precipitous decline in the NASDAQ, the sudden shift of analysts’ focus from growth prospects to short-term profitability across the entire technology industry,

⁹ Bizarrely, AT&T alleges that “[a]pplicants have failed to substantiate their claim that OnePoint must merge with Verizon in order to survive.” AT&T Petition to Deny at 6. The Stavig declaration attached to the application directly substantiates this point.

¹⁰ Public Interest Statement, Attachment 1, at 3.

¹¹ AT&T Petition to Deny at 17.

instability abroad, the prospect of increasing inflation, the need for continuing massive infusions of capital to deploy ever-changing technology, and any other pertinent explanation for the CLECs' financial woes. In AT&T's world view, the blame lies entirely with the ILECs – who have provided tens of thousands of collocation arrangements, lost up to 20 percent or more of their business customers and millions of residential customers to competition, and invested billions of dollars in modifying their networks and operations support systems to accommodate CLECs. AT&T's claim is absolutely absurd, particularly as applied to Verizon, which faces some of the most competitive local markets in the nation.

AT&T's attempt to rebut the evidence that the merger will promote the provision of bundled services to residents of MDUs is equally nonsensical. AT&T asserts that Verizon cannot offer such a package in the majority of its states because Verizon does not have Section 271 authority.¹² However, AT&T ignores the fact that Verizon's focus is on marketing service packages nationwide, and that roughly three-quarters of OnePoint's operations are outside the ex-Bell Atlantic states.¹³ AT&T also fails to recognize that there are a wide variety of service

¹² *Id.* at 18.

¹³ As noted in the application, the merged company plans to continue to devote substantial attention to expansion outside of Verizon's region. OnePoint has already entered into a \$50 million purchase commitment with Lucent for switching, transmission, and other associated equipment to be deployed in Arizona, Colorado, Georgia, North Carolina and Florida. OnePoint has also entered into contracts to market to 200,000 units out-of-region. Given that only 20 percent of these units have been signed up as customers to date, efforts to market to the other 165,000 potential customers will be a priority. Verizon, too, has incentives to continue out-of-region expansion. Under the *GTE/Bell Atlantic Order*, Verizon is committed to invest \$500 million in out-of-region activities. *Applications of GTE Corp. and Bell Atlantic Corp. for Transfer of Control*, FCC 00-221, CC Docket No. 98-184, ¶¶ 319-323 (rel. June 16, 2000) [hereinafter *GTE/Bell Atlantic Order*].

packages, only some of which include long distance.¹⁴ Verizon is free to provide bundles of local phone service, high-speed Internet access, and video services even where it cannot offer long distance service, and it intends to do so, capitalizing on OnePoint's platform for and expertise in serving MDU residents. In fact, as the Public Interest Statement makes clear, DSL will be an important offering of the merged company,¹⁵ and there plainly is no bar to Verizon's offering DSL anywhere in the country.

AT&T's final, and equally unavailing, attack on the public interest benefits of this merger is an argument that Verizon has failed to demonstrate that it needs to "acquire OnePoint in order to offer services to MDUs outside of its region."¹⁶ The Applicants, however, never made any such claim; nor is such a "but for" demonstration necessary to satisfy the Commission's public interest standard. Rather, the Applicants showed – and AT&T has not disputed – that OnePoint brings unique strengths to Verizon, including 200,000 passings outside Verizon's region, an extensive on-site sales and support staff, and a marketing force experienced in serving MDUs.¹⁷ Verizon will be a more capable competitor in serving MDUs with OnePoint than without, and accordingly will pose a greater threat to AT&T's dominance in providing broadband services to MDU residents. That, in and of itself, would be sufficient to show that this merger is in the public interest.

¹⁴ This failure is surprising, given that AT&T apparently offers 149 different service bundles. See Deborah Solomon and Jennifer Rewick, "Why 'Bundling' Its Consumer Services Hasn't Benefited AT&T," *Wall Street J.*, Oct. 24, 2000, at B1.

¹⁵ Public Interest Statement at 4.

¹⁶ AT&T Petition to Deny at 18.

¹⁷ Public Interest Statement at 4.

AT&T's effort to undermine the public interest benefits of this merger is unpersuasive, and its motives in making that effort are transparently to protect its own financial interests. As the next section demonstrates, AT&T's (and ALTS's) arguments that the merger will have adverse competitive effects are likewise without merit.

II. THE MERGER WILL HAVE NO ADVERSE IMPACT ON LOCAL EXCHANGE COMPETITION.

To hear AT&T tell it, Verizon's acquisition of OnePoint is part of a nefarious plot to drive most CLECs out of business and then "pick off the few competitive LECs that might still pose a threat to its continued dominance."¹⁸ Based on indefensible readings of Commission precedent, AT&T goes on to claim that this merger will "further entrench[] Verizon's local exchange bottlenecks" and "increase Verizon's incentives to discriminate against rival advanced service providers."¹⁹

The short answer to AT&T's allegations of competitive harm is that the U.S. Department of Justice granted early termination of the Hart-Scott-Rodino waiting period for the proposed transaction between OnePoint and Verizon.²⁰ To the extent AT&T's argument rests on supposed general principles of antitrust law,²¹ this action by the government's expert antitrust regulator is dispositive. No wonder, then, that AT&T neglects to mention it.

¹⁸ AT&T Petition to Deny at 3.

¹⁹ *Id.* at 8.

²⁰ See letter from Nancy J. Victory, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Sept. 18, 2000.

²¹ See, e.g., AT&T Petition to Deny at 11 & nn. 31-33.

A. The Merger Will Not Eliminate a Significant Local Exchange Competitor.

Perhaps recognizing that the merger raises no general antitrust concerns, AT&T suggests that the Commission has held that when an ILEC acquires “even one of several *significant* potential entrants into its local services market, that the merger is anticompetitive.”²² AT&T fails to acknowledge, however, that OnePoint is not a “significant” actual or potential competitor in the mass market under the Commission’s analytical framework.

In fact, OnePoint’s competitive presence in Verizon’s region is *de minimis* – it serves approximately 11,000 local telephone customers (for a market share of 0.027 percent), all on a resale basis.²³ Beyond any doubt, OnePoint does not meet the Commission’s standard for significance: it does not possess “the greatest capabilities and incentives to compete most effectively and soonest in the relevant market,” considering technical strength, infrastructure, and important intangibles such as “brand name recognition in the mass market, a reputation for

²² AT&T Petition to Deny at 11 (emphasis added). AT&T criticizes Verizon and OnePoint for focusing on bundled services rather than local telephony service. *Id.* at 8-9. As described in the Public Interest Statement (at 6-8), because carriers can focus their marketing efforts in MDUs and there is a concentrated customer base, bundled services are highly relevant in the MDU business. AT&T and other cable companies, moreover, are the leading providers of these bundles (which include voice service), and Verizon is not currently a major competitive presence. Nonetheless, as the text explains, there are no competitive harms even looking separately at the provision of voice telephony.

²³ OnePoint serves fewer than 46,000 customers nationwide. In Verizon’s region, OnePoint serves 14 customers in Delaware, 154 in the District of Columbia, 5800 in Maryland, 195 in Pennsylvania, and 4600 in Virginia. This constitutes 0.036 percent, 0.15 percent, 1.65 percent, 0.03 percent, and 1.13 percent, respectively of the total MDU units in each of those states.

providing high quality, reliable service, existing customer relationships, or the financial resources to obtain these intangible assets.”²⁴

Measured against this standard, the Commission (in *Bell Atlantic/NYNEX*) identified as significant competitors only AT&T, MCI WorldCom, Sprint, and neighboring RBOCs. It declined to characterize as significant any other local exchange competitors – even those, such as MFS, which had revenues of \$4.49 billion at the time (roughly 200 times those of OnePoint).²⁵

As the Commission explained:

Because of their relatively limited access to capital and their low brand name recognition among small business and residential customers, we are unpersuaded . . . that CAPs are, either singularly or as a class, likely to have significant competitive impact in the relevant markets.²⁶

By failing to limit its analysis to “significant” competitors, AT&T attempts to create a *per se* rule barring any acquisition by an RBOC of any local exchange competitor.²⁷ That rule simply does not exist.²⁸

²⁴ *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Transfer of Control*, 12 FCC Rcd 19985 at ¶ 62 (1997) [hereinafter *Bell Atlantic/NYNEX*].

²⁵ *Id.* at ¶¶ 70-94. OnePoint had revenues in 1999 of approximately \$21 million.

²⁶ *Id.* at ¶ 88; see also *Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer of Control*, 13 FCC Rcd 15236 at ¶ 25 (1998) (“The Commission further found [in *Bell Atlantic/NYNEX*] that facilities-based CLECs, such as Teleport, were not among the most significant market participants in this market, because they lacked the financial resources and brand name reputation necessary to enter the residential and small business market quickly.”).

²⁷ See also AT&T Petition to Deny at 14.

²⁸ Indeed, this is not the first acquisition by an ILEC of a CLEC in its region. In *Qwest/U S West*, for example, the Commission permitted the combination of U S West’s ILEC operations and Qwest’s CLEC xDSL resale operations, noting that “Qwest’s entry into the xDSL market in the U S WEST region has been relatively limited to date and that Qwest has not made any

(Continued...)

AT&T also claims that Verizon and OnePoint have failed to provide a sufficiently localized competitive analysis. It suggests, for example, that more data are needed on whether various competitors serve the precise areas that OnePoint serves; whether those competitors use their own facilities; whether they have the same capabilities as OnePoint; whether they target the same types of MDUs, or whether they offer the same service bundles as OnePoint.²⁹ AT&T is wrong. AT&T cites no Commission decisions requiring such a painstakingly precise analysis because none exist. The agency's precedent plainly does not support such a granular approach. In *Bell Atlantic/NYNEX*, for example, the Commission considered the actual and potential significant mass market competitors in LATA 132, but it did not examine the specific capabilities and service offerings of each competitor.

Consistent with the Commission's analytical framework, the Public Interest Statement makes clear that MDUs served by OnePoint already face or readily could face (under the Commission's consideration of significant potential competitors) competition from a number of important, facilities-based competitors. First and foremost among these is AT&T itself, which remains the nation's leading long distance provider and is now the dominant cable operator (and, in that capacity, probably enjoys exclusive marketing or even exclusive access rights in more MDUs than any other competitor). WorldCom and Sprint also must be considered significant

(...Continued)

significant investments in such entry and that other firms could enter easily in this manner if market conditions warrant.” *Applications of Qwest Communications International Inc. and U S West Inc. for Transfer of Control*, 15 FCC Rcd 5376 at ¶ 32 (2000) [hereinafter *Qwest/U S West Order*]. The same holds true here with respect to OnePoint.

²⁹ AT&T Petition to Deny at 13-14.

potential competitors for the provision of mass market local telephone services under the *Bell Atlantic/NYNEX* framework.

Beyond the significant competitors previously identified by the FCC, a number of other companies pose a much greater competitive presence than OnePoint. Other cable companies, such as Jones (now Comcast), Cox, and Time Warner are tremendously able competitors in the areas where they hold cable franchises, and as the Public Interest Statement noted, these companies increasingly are offering service packages (including local telephony) that are taken by up to 80 percent of new residents of MDUs where these companies have marketing agreements.³⁰ Whether or not those companies currently compete against OnePoint – and they often do – their capabilities and business plans indicate that they will become increasingly potent competitors in providing voice services to MDU residents.

Another substantial competitor in providing voice services to MDU residents is RCN, which considers itself “the nation’s first and largest facilities-based provider of bundled local and long distance phone, cable television, and high-speed Internet services to the most densely populated residential markets in the country.”³¹ That company, marketing its services in the Washington, D.C. area under the “StarPower” name (through a joint venture with Pepco), has become the leading non-cable company provider of competitive service bundles in the in-region

³⁰ Public Interest Statement at 11.

³¹ See “RCN Reports Strong Second Quarter Results; Solid Increases in Revenues and Connections,” <http://www.rcn.com/investor/press/07-00/07-31-00.html>. RCN states that its “high-capacity local fiber-optic networks target densely populated areas that represent 44% of the U.S. residential communications market located in just 6% of its geography.” *Id.* Undoubtedly, this concentration of population is attributable to the large number of MDUs in the RCN markets.

states where OnePoint operates. RCN offers packages of video, voice, and Internet access to both MDU residents and the mass market in general, and it has every intention of aggressively expanding its operations. In fact, RCN now passes more than a million homes, including more than 830,000 that it considers “marketable” – that is, “ready for immediate sale of all of its services.”³² Finally, communications providers associated with REITs must be considered important actual or potential competitors given their massive property portfolios.³³

B. The Merger Will Not Increase Verizon’s Ability to Discriminate Against Advanced Service Competitors.

AT&T claims that the merger would “enhance Verizon’s incentives to discriminate against rival advanced service providers” by creating “spillover” effects resulting from the acquisition of another local service provider outside its traditional service area.³⁴ AT&T is wrong again. The Commission’s spillover theory, whatever its merits when an ILEC acquires another ILEC,³⁵ applies only where an incumbent LEC expands the footprint over which it

³² *Id.* Many of RCN’s customers are in the Philadelphia area (notwithstanding AT&T’s implication, *see* AT&T Petition to Deny at 13, that there are no competitors serving MDUs there). According to the company, “RCN is rapidly establishing its footprint in the greater Philadelphia region. The company now has secured approvals to bring its services to more than 134,000 homes in 18 municipalities in Delaware County and 7 in Bucks County. The company is currently constructing its fiber-rich Megaband network in 11 Philadelphia-area communities and has begun to deliver its bundled telephone, cable television and high-speed Internet services – known as ResiLink – to residents of Folcroft, Ridley Township and Eddystone.” *See* “RCN Expands Presence in the Philadelphia Region, October 2, 2000, <http://www.rcn.com/investor/press/10-00/10-02-00/index.html>.

³³ *See* K. Anderson, “Buildings Looking to Get Wired Say ‘BLEC,’” TechWeb News (Aug. 16, 2000), <http://www.techweb.com/wire/story/TWB20000816S0009>.

³⁴ AT&T Petition to Deny at 14-16.

³⁵ Contrary to AT&T’s assertion, *see id.* at 15 n.48, Verizon does not concede that the spillover theory has merit under any circumstances.

operates as an *incumbent*. While AT&T claims that *Qwest/U S West* applied this theory to the combination of an ILEC and an out-of-region CLEC, the Commission plainly rejected, rather than endorsed, such a theory in that decision:

We disagree with McLeod's argument that the merger raises the same competitive concerns raised in *SBC/Ameritech*. To the contrary, we find the facts of this case are clearly distinguishable from those in *SBC/Ameritech*. In *SBC/Ameritech*, we found that the merger of the two BOCs, by increasing the geographic size of the merged entity's local service area, increased the incentive of the merged company to discriminate against competitors in the provision of advanced services, interexchange services and local services. Here, in contrast, *because the merger of Qwest and U S WEST will not result in a larger footprint for the incumbent LEC*, the merged entity does not face the same increased incentives to discriminate.³⁶

There is, therefore, no substance to AT&T's claims that the merger would increase the merged company's incentive or ability to discriminate against competing advanced service providers. To the contrary, as demonstrated in the Public Interest Statement, the Verizon/OnePoint combination will promote the delivery of advanced services both inside and outside Verizon's region, directly advancing the important policy goals of Section 706 of the 1996 Act.

³⁶ *Qwest/U S WEST*, ¶ 41 (emphasis added). As AT&T notes, *see* AT&T Petition to Deny at 15 n.48, the Commission went on to state that combining U S WEST's ILEC operations with Qwest's CLEC and IXC businesses would enhance the merged entity's incentive to discriminate against CLECs currently competing or entering U S WEST's region and competing IXCs. *Qwest/U S WEST*, ¶ 42. The Commission then held, however – in a passage not referenced by AT&T – that such incentives existed under the 1996 Act in any event because BOCs could offer out-of-region interLATA services, and the potential for discrimination against competitive LECs would be ameliorated by providing advanced services through a separate subsidiary (as is the case here). *Id.*

C. OnePoint Has No Exclusive Access Agreements and There Is No Policy or Legal Basis for Conditioning Approval of the Merger on Cancellation of OnePoint's Existing Marketing Agreements.

ALTS, the only other party to express concerns about the merger, does not urge the Commission to deny the merger and does not raise any challenges to the Applicants' public interest showing. Instead, ALTS asks the Commission to condition approval of the merger on cancellation of OnePoint's existing exclusive marketing agreements, even though those agreements pre-date the merger and are in no way impacted by it. Because those agreements are fully consistent with existing Commission rules and there is no nexus between ALTS's concerns and this merger, that relief must be denied.

The Commission recently prohibited prospective exclusive *access* agreements involving commercial multiple tenant environments.³⁷ As ALTS expressly recognizes,³⁸ the Commission has not prohibited exclusive *marketing* agreements. Rather, it has solicited comments on whether such arrangements should be permitted.³⁹ OnePoint has no exclusive access agreements with either commercial MTEs or residential MDUs. OnePoint's agreements give it exclusive preferential marketing rights and establish a sales channel relationship in which the property owner's on-site representative works with OnePoint to make marketing materials available to tenants and prospective tenants and to take orders. Importantly, OnePoint's contracts do not

³⁷ *Promotion of Competitive Networks in Local Telecommunications Markets*, FCC 00-366 at ¶ 27 (Oct. 25, 2000) [hereinafter *Competitive Networks*].

³⁸ ALTS Comments at 2.

³⁹ *Competitive Networks*, ¶¶ 165-168.

foreclose the tenant's ability to choose any available service provider.⁴⁰ OnePoint strongly supports non-discriminatory access to all properties and unrestrained customer choice of provider (including a provider of multichannel video and Internet access services).

Even though OnePoint's marketing agreements are fully consistent with existing law (and in no way impede access by any other provider), ALTS argues without elaboration that "permitting Verizon to purchase exclusivity of any type in connection [with] its provision of telecom services in its regions of incumbency would run counter to the essential nature and intent of the Telecommunications Act of 1996."⁴¹ Other than this bald assertion, however, ALTS offers no explanation as to how OnePoint's impending ownership by Verizon could somehow convert the marketing agreements into access barriers.

Verizon's acquisition of OnePoint will have no effect whatsoever on the ability of any resident of an MDU served by OnePoint to select whatever provider of local telephony (or any other service) it wishes. Consequently, there are no merger-specific effects, and the Commission already is considering the issues raised by exclusive marketing agreements in a separate proceeding applicable to all service providers. Under these circumstances, the Commission has made it clear that it will not grant relief of the type sought by ALTS.⁴² ALTS has raised no

⁴⁰ As such, not only are OnePoint's agreements consistent with current FCC policies, but they unquestionably are consistent with the antitrust laws. Specifically, under well-settled antitrust principles, there is no exclusive dealing arrangement (and therefore no issue of market foreclosure) where other sellers can continue to sell to the buyer (as in this case, where residents of MDUs served by OnePoint are unrestricted in their ability to choose another service provider). *See, e.g., Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90 (2d Cir. 1987).

⁴¹ ALTS Comments at 4.

⁴² *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214* (Continued...)

arguments justifying a departure from this prudent policy.⁴³ Accordingly, ALTS' request to condition approval of the merger on cancellation of OnePoint's existing marketing agreements must be summarily rejected.⁴⁴

(...Continued)

Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, FCC 00-202, CS Docket No. 99-251, at ¶ 143 (rel. June 6, 2000) (where “[t]he merger is not the cause of [an] alleged competitive threat,” the license transfer proceeding “is not the appropriate forum to address [that] issue”); *En Banc Hearing on America Online, Inc. and Time Warner, Inc., Applications for Transfer of Control*, July 27, 2000, Statements of Commissioner Ness (“An issue that . . . is not merger-specific, should not affect our decision whether to grant, condition, or deny the merger application”), Commissioner Powell (“We should not use a merger proceeding to impose conditions on one company in an industry, if the putative harm identified is not specific to the merger. . . .”); *Bell Atlantic/NYNEX*, ¶ 210 (finding that issues being considered in a separate, industry-wide proceeding should be addressed in that proceeding, not through imposition of merger conditions applicable to individual competitors).

⁴³ Citing a cross-ownership case from 1975, ALTS contends that “firms are now on notice of the possibility” that a ban on exclusive access arrangements may be imposed in the residential environment, and that “[w]here there is a transfer of control involving the transfer of *de jure* or *de facto* exclusive agreements from a competitive carrier to an incumbent, the exclusive agreements should not be permitted to retain their grandfathered status for commercial environments, nor should they be allowed to remain in effect after the transfer of control for residential environments.” ALTS Comments at 4-5, *citing Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules*, 50 FCC Rcd 1046 at ¶ 103(1975).

Contrary to ALTS's suggestion, OnePoint has no exclusive access arrangements, and this merger does not transform the existing marketing arrangements into access arrangements. In any event, the 25-year old decision cited by ALTS came from an entirely different area of the Commission's jurisdiction and was animated by entirely different policy goals than apply here. As such, it is plainly inapposite. Unlike the situation there, where the Commission already had adopted a rule prospectively prohibiting certain cross-ownership relationships, there is no rule barring prospective exclusive marketing arrangements – and there certainly is no rule putting carriers on notice that if they are acquired in the future, the Commission will require them to “divest” such arrangements. ALTS essentially is asking the Commission to pre-judge the outcome of its pending rulemaking and apply that decision here. This, the Commission cannot do.

⁴⁴ Rejection of ALTS' proposed condition is also plainly warranted under the doctrine of unconstitutional conditions. That well-established doctrine holds that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the
(Continued...)

III. THE MERGER IS FULLY CONSISTENT WITH SECTION 271.

As the Public Interest Statement explains, OnePoint has taken steps to divest itself of its in-region long distance customers. All of these customers have been notified of the service discontinuance in accordance with the Commission's Rules and a default provider has been selected, who will provide service at the same rates. In addition, OnePoint has requested Commission approval of a PIC change waiver, and OnePoint has provided all required notices. OnePoint will discontinue all in-region long distance service before the merger closes. Once these customers have been divested, this merger will raise no Section 271 issues.⁴⁵

AT&T does not dispute the fact that the divestiture of these customers will address any Section 271 concerns raised by OnePoint's provision of resold long distance voice service. It does, however, speculate on a host of possible violations resulting from Verizon's gaining "control of OnePoint's 'network' and associated transport facilities being deployed to provide high-speed Internet access and IP-based voice services."⁴⁶ There is no basis for this speculation: OnePoint owns no in-region interLATA facilities, provides no in-region, interLATA DSL

(...Continued)

government may withhold that benefit altogether." Sullivan, Kathleen M., "Unconstitutional Conditions," 102 Harv. L. Rev. 1413, 1415-16 (1989). Because marketing activities fall within the zone of protected free speech, the doctrine prevents conditioning merger approval upon elimination of the combined company's ability to market its services.

⁴⁵ While OnePoint provides pre-paid calling cards to customers in out-of-region states, effective with the closing of the merger it will block in-region originating calls using those cards unless and until Verizon has obtained section 271 authorization. Accordingly, OnePoint's calling card offering raises no 271 issues. In addition, OnePoint will institute a GSP arrangement for its very few in-region Internet access customers (totaling approximately 200 individual customers residing in five properties in Virginia).

⁴⁶ AT&T Petition to Deny at 20-21.

circuits, and after closing, will provide no interLATA transport in conjunction with its Internet offerings.⁴⁷

The Lucent and Glenayre Technologies press releases cited by AT&T are irrelevant to Verizon's Section 271 obligations. The Lucent deal, as the press release makes clear, involves a three-year agreement for deployment of Lucent's PathStar™ Access Server to deliver integrated services.⁴⁸ The server is being deployed in Phoenix and Denver. OnePoint has no network equipment – servers, transmission lines, or anything else – within the former Bell Atlantic states. The Glenayre contract involves a two-year agreement to use Glenayre's MVP modular voice processing system to deliver integrated advanced messaging services.⁴⁹ OnePoint has not deployed that system anywhere within the former Bell Atlantic states and does not otherwise offer any interLATA messaging services in those states. In addition, all DSL currently provided by OnePoint in Verizon's region uses leased intraLATA links provisioned by multiple providers, including Verizon. None of the DSL links crosses a LATA boundary to a central node, as AT&T speculates.⁵⁰ In sum, the only Section 271 issues associated with this merger will be taken care of prior to closing.

⁴⁷ See footnote 45, *supra*.

⁴⁸ "OnePoint and Lucent Technologies Sign \$50 M Agreement," Aug. 24, 1999, available at <http://www.onepointcom.com/investors/news/pressrelease.asp?prID=37&userType=investor>.

⁴⁹ "Glenayre, OnePoint Sign Multimillion Dollar Contract for Enhanced Services Platform," Dec. 15, 1999, available at <http://www.onepointcom.com/investors/news/pressrelease.asp?prID=40&userType=investor>.

⁵⁰ AT&T Petition to Deny at 21.


IV. CONCLUSION.

For the foregoing reasons, Verizon's acquisition of OnePoint plainly advances the public interest and raises no legitimate competitive concerns. The Commission should accordingly promptly approve the requested transfer applications.

Respectfully submitted,

ONEPOINT COMMUNICATIONS CORP.

VERIZON COMMUNICATIONS


Richard P. Kolb (NJV)

OnePoint Communications Corp.
Two Conway Park
150 Field Drive, Suite 300
Lake Forest, IL 60045
(847) 735-7000


Michael E. Glover (NJV)

Karen Zacharia
Verizon
1320 North Courthouse Road, 8th Floor
Arlington, VA 22201
(703) 974-4865

Jeffrey S. Linder
Nancy J. Victory
Daniel J. Smith
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel to Verizon

October 27, 2000

ATTACHMENT I



"Broach, Anita M, NTCOM" <abroach@att.com> on 10/20/2000 02:46:08 PM

To: teresa.f.ward@verizon.com
cc: (bcc: TERESA F. WARD/EMPL/VA/Bell-Att)
Subject AT&T Data & Internet Services ReMarketer Program
:

Dear Teresa,

I apologize that we have not been able to connect "live." I ended up traveling/customer visits this week in New Jersey. I know you are very busy. I just tried to leave you a vm but the mailbox was full!! Let me know your availability next week (Oct 23 - 27) to review via conf. call the AT&T ReMarketer Program. As I have stated in my messages to you, AT&T is actively pursuing ReMarketer Partners specifically targeted at the BLEC/MTU markets. With Verizon's acquisition of OnePoint Communications, this potentially could be a great fit.

For your information, I have attached a one-page overview of the program. Once we have had a chance to speak live, my Director and I would like to meet with you in person to review the program in greater detail.

Teresa, I look forward to working with you.

Thanks,

> Anita M. Broach
> AT&T
> Alliance Channel Sales Manager - Service Provider Markets
> 978-287-4848
> abroach@att.com
>
> <<ATT Remarketer Requirements.doc>>



- ATT Remarketer Requirements.doc

AT&T Data and Internet Services Remarketer Program

AT&T's Data and Internet Services (ADIS) Remarketer Program allows our remarketer partners an opportunity to address the high speed, broadband Internet access needs of businesses utilizing AT&T's full breadth of data and IP services. From dial to dedicated high-speed access, from web site hosting to co-location, from point to point to multi-point high speed packets, our remarketer partners will have the ability to deliver the highest quality data and IP solutions.

Benefits

- Commissions are earned on revenues
- One-time incentives earned on specific IP and data services
- A remarketer receives pricing based on the volume of the commitment
- Market development funds available
- Use of branded or co-branded services

Requirements

- Three-year contract and a volume level commitment.
- Signed non-disclosure agreement
- Completed credit application (conditions may apply)
- Remarketer's Service Solution and Marketing Plan
- Signed Master Agreement and Remarketer Agreement

Roles and Responsibilities

AT&T:

- Process and deliver service requests on contracts obtained by remarketer
- Provides customer service to the remarketer
- Provides technical and marketing information to the remarketer
- Sets up and handles Reseller's account
- Handles exceptions/special requests
- Bills Reseller for all end-user accounts
- Compensate remarketer for sales of ADIS services
- Provide Market Development Funding
- Provide training to remarketer
- Provide access to the tools and materials required to make sales
- License certain AT&T Trademarks to remarketer

Remarketer:

- Market, promote, resell and support ADIS' services
- Maintain a staff of trained sales personnel
- Provides customer service to its end-users
- Bills and collects revenues from its end-users and resolves all end-user billing disputes
- Provide marketing planDedicate sufficient personnel to the marketing and support of the servicesComplete requisite trainingAchieve revenue objective set forth in the marketing plan

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2000, I caused copies of the foregoing Reply Comments of OnePoint and Verizon to be mailed via first-class postage prepaid mail to the following:

David L. Lawson
C. Frederick Beckner III
David W. Jones
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006

Mark C. Rosenblum
Lawrence J. Lafaro
Aryeh S. Friedman
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Jonathan M. Askin
The Association for Local Telecommunications Services
Suite 900
888 17th Street, N.W.
Washington, D.C. 20006

Philip L. Verveer
Gunnar D. Halley
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036


Barbara Pomeroy